

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 3 October 2014
Judgment handed down on 6 February 2015

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

STEPHEN J MACE

APPELLANT

NATIONAL UNION OF MINeworkERS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ARTHUR SCARGILL
(Representative)

For the Respondent

MR DAMIAN BROWN
(One of Her Majesty's Counsel)
Instructed by:
National Union of Mineworkers
Legal Department
Miners Offices
2 Huddersfield Road
Barnsley
S70 2LS

SUMMARY

TRADE UNION MEMBERSHIP

The Certification Officer did not err in dismissing a Complaint by Mr Mace that the successful candidate for election as National President in 2012 was ineligible to stand as he was not a member of the National Union of Mineworkers within the meaning of NUM Rule 5A(iii). The Certification Officer did not err in holding that Mr Wilson came within the intended meaning of the Rule as an Area Official performing duties for the NUM (Scotland Area) which was an Area within the rules although he was paid by the NUM (Scottish Area). Further, the Certification Officer did not err in holding that the Union could rely on **Trade Union and Labour Relations (Consolidation) Act 1992** Section 47(3) to uphold a condition of membership of the NEC as a qualification for standing for election as National President.

THE HONOURABLE MRS JUSTICE SLADE

1. Mr Mace appeals under Sections 108C and 56(1) of the **Trade Union and Labour Relations (Consolidation) Act 1992** ('TULRCA') from the decision of the Certification Officer ('CO') on 18 July 2013 on his complaints about the election of the National President or the National Union of Mineworkers ('NUM') in 2012.

2. At the hearing before me, Mr Mace was represented by Mr Arthur Scargill and the NUM by Mr Damian Brown QC. References to paragraph numbers are to those in the judgment of the CO unless otherwise indicated.

3. At all material times Mr Mace was a member of the NUM. By an application received at the Certification Office on 18 May 2012, Mr Mace made complaints against the NUM of breaches of **TULRCA** and of the Rules of the NUM regarding the acceptance on 19 December 2011 of the nomination of Mr Wilson as a candidate for election to the position of NUM National Lay President and the refusal of his nomination. The Complaints were formulated as follows:

"Complaint 1

On or about 19 December 2011 the NUM acted in breach of Rules 5.A (i)-(viii), Rule 5.D (i), Rule 14.C and Schedule One of its National Rules by accepting a nomination for Mr. N Wilson as a candidate for the office of National Lay President 2012.

Complaint 2

The decision to exclude Mr. Mace's nomination to stand as a candidate for the position of NUM National Lay President taken on or about 19 December 2011 was an unreasonable exclusion and is a breach of Rule 14.A and Section 46(1) and Section 47(1) of the 1992 Act.

Complaint 3

On or about 19 December 2011 the NUM acted in breach of National Rule 14.A and in breach of Section 46(1) and Section 47(1) of the 1992 Act in relation to the nomination and election for the Office of National Lay President."

4. The CO dismissed Complaint 1. On Complaint 2 he declared that the Union breached **TULRCA** Section 47(1) by excluding members, in particular Mr Mace, from standing as a candidate for the position of NUM President in 2012. On Complaint 3 the CO declared that the Union was in breach of **TULRCA** Section 46(1) and Rule 14A of its rules. The election was not carried out in accordance with Section 47(1). The CO ordered that the election of the NUM National President 2012 accepted by the National Executive Committee ('NEC') on 29 February 2012 be set aside and Mr Wilson forthwith cease to hold office. Further, he ordered:

"5...that an election for the office of National President so vacated shall take place so that the result is declared no later 18 November 2013. The election shall be conducted so as to comply with Chapter IV of the 1992 Act and the rules of the Union, excluding the requirement in rule 14.C that nominations are made by Areas and the requirement that at the close of nominations only those candidates shall be eligible for election who have received the nominations of Areas the total membership of which together amounts to 30% or more of the total membership of the Union on the basis of the number of members for which contributions have been paid to the Union for the twelve months ending on the preceding 31st December."

5. By his First Ground of appeal Mr Mace appeals from the dismissal of his first complaint to the CO. By his Second Ground of appeal Mr Mace asks the Employment Appeal Tribunal ('EAT') to set aside the Enforcement Order in paragraph 5 of the Decisions. In place of that Enforcement Order Mr Mace seeks:

"(iii) an Enforcement Order that Mr. Mace should be declared elected unopposed to the office of National lay President on 29 February 2012 on the grounds that he was the only valid candidate;

(iv) an Enforcement Order that an election for the Office of National lay President shall take place which complies with Rule 14.A and Chapter IV of the 1992 Act and the Rules of the Union, an election which shall not permit Mr. N. Wilson – who ceased to be a member of the Union – to be nominated or to stand in the election for the office of National President."

6. ***The Relevant Rules of the NUM***

5. Membership

5.A Full Membership. The following categories of persons are eligible for full membership of the Union and in these Rules the expression 'members' means a full member unless otherwise stated.

5.A(iv) (now iii) All persons employed by the Union or by an Area including National or Area Officers/Agents.

...

14. Election of National Officials

14.A The National President and National Secretary shall be elected in line with legislation.

...

Rule 14.C Each Area shall nominate one candidate for the position of National President and National Secretary, provided that such nomination is confined to a person who is a member of the National Executive Committee in full financial membership and has been for at least 12 months. At the close of nominations, only those candidates shall be eligible for election who have received the nominations of Areas the total membership of which together amounts to 30% or more of the total membership of the Union on the basis of the number of members for which contributions have been paid to the Union for the twelve months ending the preceding 31st December.

...

17. Areas

17.A The members of the Union shall for the purpose of administration be organised into divisions of the Union to be known as “Areas” listed in Schedule One hereto as amended from time to time.

17.B The membership of any Areas may but need not be members of one or more Constituent Associations.

17.C A “Constituent Association” means registered trade union other than the Union itself comprising of members of the Union and which has been approved for that purpose by Conference. A Constituent Association may with approval of the Union dissolve itself, merge, combine, amalgamate with or transfer engagements to any other Constituent Association, or merge, combine, amalgamate with or transfer engagements to the Union. Conference shall have the power to admit and expel a Constituent Association.”

Trade Union and Labour Relations (Consolidation) Act 1992

“47 Candidates

(1) No member of the trade union shall be unreasonably excluded from standing as a candidate.

...

(3) A member of a trade union shall not be taken to be unreasonably excluded from standing as a candidate if he is excluded on the ground that he belongs to a class of which all the members are excluded by the rules of the union.

But a rule which provides for such a class to be determined by reference to whom the union chooses to exclude shall be disregarded.

...

54 Remedy for failure to comply with requirements: general.

(1) The remedy for a failure on the part of a trade union to comply with the requirements of this Chapter is by way of application under section 55 (to the Certification Officer) or section 56 (to the court).

(2) An application under those sections may be made—

(a) by a person who is a member of the trade union (provided, where the election has been held, he was also a member at the time when it was held), or

(b) by a person who is or was a candidate at the election;

and the references in those sections to a person having a sufficient interest are to such a person.

...

55 Application to Certification Officer

(1) A person having a sufficient interest (see section 54(2)) who claims that a trade union has failed to comply with any of the requirements of this Chapter may apply to the Certification Officer for a declaration to that effect.

...

(5A) Where the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is, an order imposing on the union one or more of the following requirements—

(a) to secure the holding of an election in accordance with the order;

(b) to take such other steps to remedy the declared failure as may be specified in the order;

(c) to abstain from such acts as may be so specified with a view to securing that a failure of the same or a similar kind does not occur in future.

The Certification Officer shall in an order imposing any such requirement as is mentioned in paragraph (a) or (b) specify the period within which the union is to comply with the requirements of the order.

(5B) Where the Certification Officer makes an order requiring the union to hold a fresh election, he shall (unless he considers that it would be inappropriate to do so in the particular circumstances of the case) require the election to be conducted in accordance with the requirements of this Chapter and such other provisions as may be made by the order....

...

108A Right to apply to Certification Officer.

(1) A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2)The matters are—

(a) the appointment or election of a person to, or the removal of a person from, any office;"

Relevant findings of fact of the CO

7. Mr Wilson started work in the mining industry in Scotland in 1967 when he joined the NUM. He worked as an electrician and therefore became a member of the Scottish Colliery Engineman, Boilerman and Tradesmen Association ('SCEBTA').

8. In the 1987 rules of the NUM, Scotland was named as an Area and its corresponding Constituent Association as the NUM (Scottish Area). SCEBTA was listed in Schedule One to

the Rules as a Constituent Association and the Area against which its name appears was 'Group No 2'.

9. The CO recorded in paragraph 14 that Mr Wilson gave evidence that in 1987 the National Conference of the NUM decided that the two Constituent Associations in Scotland, the NUM (Scottish Area) and SCEBTA, should come together and be operated as one Area to be known as the NUM (Scotland Area). The steps by which this objective was achieved are not entirely clear but the following evidence was referred to by the CO:

"16. The minutes of the meeting of the EC of the NUM (Scottish Area) of August 1988 record that the national NEC had all the requisite powers under the national rule book to compel the process and that the Scottish EC would be advised of the rules which would apply to the new NUM (Scottish Area), SCEBTA and national officials. They go on to record that the officials of the NUM (Scottish Area):

"...had secured the clear understanding in the new rules themselves, and in correspondence from Mr Scargill, that all the property and assets of the old NUM Scottish Area would remain the property of the old Scottish NUM Area, and therefore with the formation of the new Area from 1st January 1989, Trustees would require to be appointed to administer the funds and property of the old Area, the new "NUM (Scotland Area)" being financed solely from the contributions of the members of the NUM and SCEBTA."

...

19. Mr Wilson gave evidence that the new structure that came about on 1 January 1989 was as a result of an agreement with the NEC, which agreed the new rule books and the officials who could be retained. He was uncertain if this agreement was approved at a National Conference but he was quite sure that it had been agreed by the NEC.

20. The current rules of the NUM (Scotland Area) begin as follows:

"Following the review of the NUM organisation, accepted by the NEC on the 9th October 1986, and adopted by the NUM Annual Conference in July 1987, agreement has been reached between the National Union of Mineworkers (hereinafter referred as to the 'National Union' and the National Union of Mineworkers (Scottish Area) and National Union of Mineworkers (Group 2, Scottish Colliery Engineman, Boilerman and Tradesmen Association) (hereafter referred to as the 'Former Constituent Associations'). In accordance with the said decision of the NEC and Annual Conference, the said former Constituent Associations will combine for the purpose of administration and be organised into a new Area of the National Union of Mineworkers (Scotland Area) in accordance with Rule 17 of the National Union.

1 NAME

The Area Union shall be called 'National Union of Mineworkers (Scotland Area) and is in these rules referred to as 'The Area Union' and its offices shall be at 3D Hercus Loan, Musselburgh, East Lothian EH21 6AU. The Area Union shall be an Area of the National Union of Mineworkers (hereinafter referred to as the 'National Union')"

21. The current rules of the NUM (Scottish Area) begin as follows:

Rule 1 – Name

The Union shall be called “The National Union of Mineworkers (Scottish Area) and is in these rules referred to as ‘The Union’ and its registered offices shall be at 3D Hercus Loan, Musselburgh, East Lothian. The Union shall be a constituent part of the National Union of Mineworkers.

Rule 2 – Constitution

The Union shall be composed of those members of the National Union of Mineworkers (Scotland Area) who are described as ‘Scottish miners’ in Appendix II of the Rules of the National Union of Mineworkers (Scotland Area).

Rule 3 – Objects

The objects of the Union shall be:

i. to protect and advance the interests of the Union in relation to opportunities for, and the terms and conditions of their employment;

ii. to support the objects of the National Union of Mineworkers (Scotland Area)

...

22. The current rules of SCEBTA are in similar terms to the rules of the NUM (Scottish Area).”

10. The CO held at paragraph 25:

“On the evidence before me, it appears that the members of NUM (Scottish Area) and SCEBTA became dual members of both their former union and what Mr Wilson called the new NUM (Scottish Area). Their subscriptions, however, were now paid into the NUM (Scotland Area) which remitted a percentage to the National NUM. The funds of the NUM (Scottish Area) and SCEBTA remained with those unions and the representation of their respective members continued to be conducted mainly in the names of those unions.”

11. The CO stated in paragraph 13 that in 1987 Mr Wilson became General Secretary of SCEBTA, NUM (Scottish Area) and NUM Scotland Area. In 1997 he failed to be re-elected. However in 1999 he was re-elected and has since then remained General Secretary of the NUM (Scottish Area), SCEBTA and NUM (Scotland Area). He lost his job as a miner in 2002 when the colliery at which he worked closed. The CO recorded in paragraph 26 that Mr Wilson maintained that in 2002 it was agreed that the NUM would employ him and that he gave evidence:

“that he was employed by and paid out of the funds retained by the NUM (Scottish Area) but performed work for NUM (Scottish Area), SCEBTA and NUM (Scotland Area).”

12. On 28 November 2011 nominations for election to the post of National President were invited. The Maltby branch of the Yorkshire Area of the Union nominated Mr Mace for election as National President. Mr Wilson had been nominated by the other two branches in the Yorkshire Area, Killingley and Hatfield. In paragraph 30 the CO recorded that the Maltby branch had about 36.2% of the members of the Yorkshire Area.

13. At a meeting on 19 December 2011 of the Yorkshire Area Council, branch delegates decided that Mr Wilson should be nominated for election as National President of the NUM. The CO was informed that Mr Wilson had also been nominated for election as National President by most of the other Areas of the Union and that Mr Mace had received no such nomination from any Area.

14. The CO recorded in paragraph 32 that he was informed that Mr Wilson had also been nominated for the position of National President by most of the other Areas of the Union. Mr Mace received nomination from no Areas. On 6 January 2012 Electoral Reform Services reported that there had been only one nomination for the position of National President, Mr Wilson, and that therefore there was no need for an election.

15. On 29 February 2012 the National Executive Committee ('NEC') declared Mr Wilson National President.

16. In January 2013 Mr Wilson transferred his employment to NUM (Scotland Area) in circumstances in which the financial viability of the Scottish Area was threatened by meeting legal costs of failed personal injury claims.

The Decision of the CO

17. The CO held at paragraph 7 that Mr Mace's first complaint, Complaint One, required a finding as to whether Mr Wilson satisfied the requirements in Rule 14.C for nomination for the position of National President. One of those requirements is that a potential candidate must be entitled to full membership of the Union at the time of nomination. The relevant criterion was whether Mr Wilson was employed "by the Union or by an Area including National or Area Officials/Agents" in accordance with Rule 5.A (iii).

18. In deciding whether Mr Wilson was a member of the NUM within the meaning of Rule 5.A(iii) at the relevant time, the CO referred to **Jacques v Amalgamated Union of Engineering Workers** [1986] ICR 683 in directing himself that trade union rules are not to be construed literally or like a statute but according to the court's view of their intention and purpose.

19. The CO reminded himself that the NUM (Scottish Area), SCEBTA and NUM (Scotland Area) are each trade unions which are unincorporated associations capable of entering into contracts. Mr Wilson's contract was with the NUM (Scottish Area). The NUM (Scottish Area) is not a Constituent Association of the National NUM nor an Area referred to in Schedule one of the Rules.

20. At paragraph 53 the CO found that

"Mr. Wilson was not directly employed by the National Union in the sense of him being paid out of the funds of the National Union."

However the CO found that the National NUM impliedly and probably expressly, consented to his employment in Scotland.

21. The CO observed that all three Scottish Unions have the same registered office, the same General Secretary and share a common membership. He held that the work performed by Mr Wilson for the NUM (Scotland Area) was paid for by the NUM (Scottish Area). He further held:

“54. The NUM (Scottish Area) and SCEBTA had sought to protect their funds from being transferred to the NUM by retaining them within separate unions, but for all other purposes the NUM (Scottish Area) and SCEBTA operated as branches of the NUM (Scotland Area) with a common membership and leadership as well as common interests.”

The CO concluded:

“...Having regard to all the circumstances, I find that Mr Wilson entered into an employment relationship with the NUM (Scotland Area) in 2002, shortly after the retirement of Mr Scargill as National President, with the consent and approval of the NEC. On the particular and unusual facts of this case, I find that Mr Wilson agreed to perform work as an Area Official of NUM (Scotland) with responsibilities for all NUM members in Scotland and that NUM (Scotland) agreed to provide that work. I find that his contract with the NUM (Scottish Area) was the means by which he was to be remunerated for the performance of his duties for the NUM (Scotland Area). I find that he was integrated into the organisation of NUM (Scotland Area) and that it controlled his work. The reality of the situation is that Mr Wilson was required (expressly or impliedly) to work on behalf of all NUM members in Scotland in the capacity of an Area Official in the sense that he was a full time officer with regional responsibilities. In finding that there was at least an implied contract of employment between Mr Wilson and the NUM (Scotland Area), I have stood back from and apportioned weight to all the details of the case in accordance with the guidance of Mummery LJ in Hall (Inspector of Taxes) v Lorimer (1994) IRLR71.

...

Looking at the overall effect of Mr Wilson’s relationships with the three NUM bodies in Scotland, the work he performs and the evolution of the present structure of the Union, it is apparent that Mr Wilson comes within the intended meaning of rule 5.A(iii) of the rules of the Union as an Area Official performing duties for the NUM (Scotland Area) but paid by a body considered to be a Constituent Association of NUM (Scotland Area).”

22. Accordingly the CO held that Mr Wilson satisfied the requirements of the NUM for membership in Rule 5.A(iii) and of candidates in Rule 14.C. He was therefore qualified to stand for nomination for the position of National President.

23. As for Complaint Two, the CO considered whether it was a breach of **TULRCA** Section 47(1) for the Yorkshire Area Council to have decided not to accept Mr Mace as a candidate in the 2012 National President election, preferring instead to nominate Mr Wilson.

24. Mr Scargill had contended that two of the requirements to qualify for nomination contained in rule 14C amounted to an unreasonable exclusion in breach of Section 47(1). These were that a candidate must be a member of the NEC and that a candidate must have received the nomination of Areas the total membership of which together amounts to 30% or more of the total membership of the union.

25. Although Mr Mace satisfied all the conditions imposed by Rule 14.C for nomination as a candidate for the position of National President, the CO held that he had jurisdiction under **TULRCA** Section 55(1) to entertain the complaints as they related to an election which is taking place or has taken place.

26. The CO held in paragraph 76 that unfettered by the **TULRCA** Section 47(3) he would find it unreasonable for the pool of potential nominees for the position of President of the NUM to be restricted to members of the NEC, nine or ten persons. However, he found that Rule 14.C does establish a class of members all of whom are excluded from nomination by the Rules of the Union, namely those not on the NEC. Those in the class of those eligible to stand for election are objectively ascertainable. It is not a rule which provides for such a class to be determined by reference to who, the Union chooses to exclude. Accordingly the CO held that the NUM could rely on Section 47(3) to uphold its condition that candidates for the position of National President must be members of the NEC and by operation of the **TULRCA** Section 47(3) that condition is deemed not to be unreasonable.

27. As for the requirement for nomination by areas with 30% of the combined of membership of the Union, the CO was informed that the decision of the Yorkshire Area

Council to reject the application of Mr Mace for nomination was left to the three branch delegates at the Area Council. The CO held at paragraph 66:

“In my judgment, any decision upon whether a person may stand in a statutory election which is left to a committee within the Union is likely to be unreasonable. No matter how such a committee carries out its task, it is unreasonable that a person’s right to stand as a candidate is dependent upon the views of others who sit as a committee determining whether to accept a nomination. Accordingly, I find that the exclusion of Mr Mace from standing in the 2012 election for National President was unreasonable and in breach of section 47(1) of the 1992 Act.”

28. The CO held that Section 47(3) did not apply to the 30% rule. He held at paragraph 78:

“I was informed that at the time of this election, the Yorkshire Area had about 56.5% of the membership of the Union, that a person who was not nominated by the Yorkshire Area would need the nominations of at least four most well subscribed Areas and that a person who received the nominations from the six Areas with the least number of members would have only secured nominations from Areas with 8.7% of the total membership. Whilst I accept that a member can seek the nomination of an Area other than his or her own, I find that as a matter of practical reality, a member’s best chance is to secure nomination from that Area. Having failed to secure the nomination of the Yorkshire Area, Mr Mace’s task in securing the nomination of sufficient other Areas would have been extremely difficult. Having considered the operation of the 30% rule on the facts of this case, I find that it did unreasonably exclude from standing as a candidate those who did not secure nominations from Areas, the total membership of which was 30% or more of the total membership of the Union.”

29. Accordingly the CO declared that the NUM breached **TULRCA** Section 47(1) by unreasonably excluding members from standing as a candidate in the 2012 National President elections.

30. The CO decided that the section 47(1) aspect of Complaint Three should be determined as a part of Complaint Two.

31. The CO recorded that the NUM correctly conceded at the hearing before him that if he found that the 2012 National President election had been concluded in breach of **TULRCA**, the person elected would not have been elected in line with legislation. There would therefore have been a breach of rule 14A of the rules of the NUM and of Section 47(1). There would also have been a breach of Section 46(1). As he had found that the 2012 National President election

was conducted in breach of Section 47(1) the CO, found that the union thereby breached the requirement in Rule 14A that the election be ‘in line with legislation’.

32. Having found that the Union breached **TULRCA** Section 47(1) and Rule 14A of the Rules of the Union the CO made an Enforcement Order in respect of the 2012 National President election. The CO noted that at the date of the hearing before him Mr Mace was serving a three year period of disciplinary suspension. He was not working in the mining industry following the closure of Maltby Colliery in March 2013.

33. The CO ordered that the result of the election of the NUM National President 2012 be set aside and Mr Wilson forthwith cease to hold office. He ordered that an election for the office of National President take place so as to comply with **TULRCA** and the Rules of the Union excluding the requirements in Rule 14.C that nominations are made by Areas and the requirement that at the close of nominations only those candidates with nominations from Areas totalling 30% or more of the membership of the Union would be accepted. The result of the election was to be declared no later than 18 November 2013.

The First Ground of Appeal

The submissions of the parties

34. At the heart of the submissions on behalf of Mr Mace on the First Ground of Appeal is the proposition that at the material time Mr Wilson was employed by and paid by the NUM (Scottish Area). The NUM (Scottish Area) was not an Area of the NUM within the meaning of Rule 17. Accordingly, after he ceased to be a working miner in 2002 and worked for the NUM (Scottish Area), Mr Wilson ceased to be eligible for membership of the NUM under Rule 5.A.

He was not eligible for membership under Rule 5.A(iii) as he was not employed by either the National Union or by an Area.

35. Mr Wilson had given evidence before the CO that in 2002 he was employed by and paid out of funds retained by the NUM (Scottish Area) although he performed work not only for that Area but also for SCEBTA and NUM (Scotland Area).

36. Mr Scargill rightly drew attention to the fact that Rule 17.A provides that Areas are listed in Schedule One to the Rules. The NUM (Scottish Area) is not so listed nor is it shown as a Constituent Association. Scotland is listed as an Area but it was submitted on behalf of Mr Mace that Mr Wilson was not employed by the NUM (Scotland Area). He was not employed by an Area of the NUM and it was agreed that he was not employed by the National Union. Accordingly, Mr Wilson was not entitled to membership of the NUM under Rule 5.A(iii).

37. Mr Scargill also relied on the transfer of Mr Wilson's employment from the NUM (Scottish Area) to the NUM (Scotland Area) in January 2013. This showed that prior to that date he was not employed by the Scotland Area if he were there would have been no need for the transfer. The CO should have had regard to the fact that Mr Wilson received a redundancy payment from the Scottish Area in 2012. This demonstrated that employment by the Scottish Area was different from employment by the Scotland Area.

38. Mr Scargill sought to rely on the fact that Mr Wilson was not a member of the NUM Superannuation Scheme and makes private pension arrangements, he referred to his own case against the NUM. An Area Official or Agent who is not elected in accordance with the Rules of the National Union is not an authorised Area Official or Agent of the NUM and is precluded

from membership of the NUM Superannuation Scheme. Further, Mr Scargill challenged the finding of the CO in paragraph 53 that the National NUM impliedly, and probably expressly, consented to the employment of Mr Wilson as Area Official in Scotland.

39. Mr Brown QC submitted that the CO did not err in concluding that Mr Wilson entered into an employment relationship with the NUM (Scotland Area) albeit that his contract with the NUM (Scottish Area) as the means by which he was to be remunerated for the performance of his duties for the NUM (Scotland) Area. Counsel drew attention to a letter of 25 October 2012 from Mr Scargill in response to questions from the CO in which he stated:

“The NUM Scottish Area is a Constituent Association of the NUM Scotland Area”.

Although he went on to say that the NUM Scottish Area is not a Constituent Association or Area of the National NUM and is not specified in Schedule One to the NUM Rules, Mr Scargill’s answer to the CO shows how interrelated the Scottish Area was with the Scotland Area. Mr Wilson performed the duties of full time official for all members of the NUM in Scotland. He was General Secretary of all three organisations within the Area.

Discussion

40. The issue at the heart of the First ground of appeal is whether the CO erred in law in holding that Mr Wilson, on 19 December 2011, was an employee of an Area of the NUM so as to be a member of the Union within Rule 5.A(iii). It was not in dispute that at that time Mr Wilson was paid by the NUM (Scottish Area) to perform duties as General Secretary of the NUM (Scottish Area), SCEBTA and NUM (Scotland Area). The CO held that he was employed by the NUM (Scotland Area) as there was “at least an implied contract of employment between Mr Wilson and the NUM (Scotland Area)”.

41. The way in which the NUM was structured in Scotland owed much to its history which may have led to some difficulty in analysis by the external observer. Rule 17.A of the Rules provides that the members of the Union shall for the purposes of administration be organised into divisions of the Union known as “Areas” listed in Schedule One to the Rules. Rule 17.B provides that the membership of any Areas may but need not be members of one or more Constituent Associations. Schedule One to the 1987 edition of the Rules shows that the NUM (Scottish Area) was a Constituent Association related to the Scotland Area. SCEBTA was also related to an Area, Group No 2. In 1987 Members of the NUM (Scottish Area) and of the SCEBTA were therefore members of an Area of the NUM.

42. In 1988 there was a reorganisation of the NUM in Scotland. The CO found that this arose from a failed attempt at a legal merger under the statutory procedure

“and a ‘forced’ merger imposed by the National Union...”

The CO found that:

“The NUM (Scottish Area) and SCEBTA had sought to protect their funds from being transferred to the NUM by retaining them within separate Unions, but for all other purposes the NUM (Scottish Area) and SCEBTA operated as branches of the NUM (Scotland Area), with a common membership and leadership as well as common interests.”

43. As a result of the change in structure of NUM membership in Scotland in 1988, there was one Area, NUM (Scotland), rather than two Areas. The consequence of Mr Scargill’s submissions would be that NUM members were those who as members in the Constituent Associations NUM (Scottish Area) and SCEBTA would have ceased in 1988 to be members in an Area of the NUM, and so lose their entitlement to membership of the Union.

44. At paragraph 54 the CO observed that

“Rule 1 of the rules of the NUM (Scottish Area) describe it as being a constituent part of the NUM and that, in correspondence with my office, Mr. Scargill described the NUM (Scottish Area) as a Constituent Association of the NUM (Scotland Area).”

All three Scottish Unions had the same registered office, the same General Secretary and common membership. This view of the relationship between them expressed by Mr Scargill in correspondence is further supported by the Notes to the Accounts of the NUM (Scottish Area) for the Year ended 31 December 2009 in which it is stated:

“National Union of Mineworkers (Scottish Area) is a Constituent part of the National Union of Mineworkers.”

45. In paragraph 54 the CO found that all the indicia of a contract of employment between Mr Wilson and the NUM (Scotland) Area were present. Other material before the CO supported the view that the former Constituent Associations in Scotland combined for the purposes of administration and were organised, as is stated in the Introduction to the Rules of the NUM (Scotland Area):

“...into a new Area of the National Union of Mineworkers (Scotland Area) in accordance with Rule 17 of the Rules of the National Union.”

46. The CO found as a fact that in 2002 Mr Wilson was paid out of the funds retained by the NUM (Scottish Area) but he performed work as an Area Official of NUM (Scotland) with responsibilities for all NUM members in Scotland and that NUM (Scotland) agreed to provide that work. In my judgment the fact that in 2013 the contract under which Mr Wilson worked transferred from the NUM (Scottish Area) to the NUM (Scotland Area) supports rather than undermines the position that all three bodies within the Scottish NUM acted as one. That Mr Wilson was made redundant by the NUM (Scottish Area) is not inconsistent with the decision of the CO that Mr Wilson’s contract was the means by which he was to be remunerated for the performance of his duties for the NUM (Scotland Area).

47. That Mr Wilson was not admitted as a member of the Miners Superannuation Scheme does not determine whether he was employed by an Area of the NUM. The Trustees of the Scheme and the CO have to reach their own decisions. This appeal is concerned with whether the CO erred in law in reaching his decision. It is not concerned with whether Mr Wilson was rightly or wrongly not a member of the pension scheme.

48. The CO applied **Jacques** in which Warner J held at page 692:

“The effect of the authorities may, I think, be summarised by saying that the Rules of a Trade Union are not to be construed literally or like a statute, but so as to give them a reasonable interpretation which accords with what in the court’s view they must have intended to mean, bearing in mind their authorship, their purpose, and the readership to which they were addressed.”

The CO applied Rule 5.A(iii) to the facts before him having regard to the reality of the arrangements under which Mr Wilson performed his duties as General Secretary of all three unions in Scotland. The two former Constituent Unions became part of the Scotland Area of the NUM which was an Area of the NUM within the meaning of Rule 17. Further, the CO adopted the guidance of Mummery LJ in **Hall (Inspector of Taxes) v Lorimer** [1994] IRLR 71 in determining employment status that:

“The overall effect can only be appreciated by standing back from the detailed picture that has been painted, by reviewing it from a distance and making an informed, considered, qualitative application of the whole.”

The CO recognised at paragraph 49 that the determination of whether Mr Wilson was employed by an Area of the NUM was not easy. He gave the question careful consideration, weighing all the material placed before him. In my judgment the CO did not err in deciding in paragraph 54:

“it is apparent that Mr Wilson comes within the intended meaning of rule 5.A(iii) of the rules of the Union as an Area Official performing duties for the NUM (Scotland Area) but paid by a body considered to be a Constituent Association of NUM (Scotland Area).”

49. The First ground of Appeal is dismissed.

Second Ground of Appeal

Submissions of the parties

50. Mr Scargill contended on behalf of Mr Mace that the CO erred in law in holding in paragraph 76 that the condition imposed by Rule 14.C that nominations for election as National Officer be restricted to members of the NEC was lawful by application of **TULRCA** Section 47(3).

51. Mr Scargill submitted that the CO erred in relying on Section 47(3). The Rule at issue effectively excludes 99.4% of the Union's membership from having the right to be nominated to stand for election as National President. He contended that such a result cannot have been intended by Parliament. He pointed out that a retiring member of the NEC or one who had just been defeated in an election as NEC member but who was still on the NEC would be eligible to stand as National Officer whereas a non member would not be eligible.

52. Mr Brown QC submitted that the CO did not err in law in reaching his conclusions including that on the application of Section 47(3) to the requirement that candidates for election as National President be members of the NEC.

Discussion

53. Mr Mace was a member of the NEC on 19 December 2011. Although this requirement of Rule 14.C did not adversely affect him the CO rightly considered that Mr Mace had a sufficient interest in the Rules of the NUM to pursue a complaint in respect of the Rule. Since the CO made a decision on whether this requirement of Rule 14.C complied with **TULRCA** Section 46, an appeal lies to the EAT on the issue under Section 56(A).

54. In considering the application of Section 47 the CO directed himself first that a union may exclude a person's nomination if to do so is not unreasonable. Secondly, that the members of the union may collectively decide upon exclusion criteria if those criteria are set out in the Rules of the Union and meet the requirements of Section 47(3).

55. The CO accepted the submission on behalf of the Union that the position of President is an important one and that members of the Union have a considerable interest in ensuring that the person elected to that position is up to the job. The President must have some experience of the Union. The CO was conscious that any restriction on candidacy for the Office of President must balance the right of all members to such nomination against the reasonable needs of the Union in having an appropriately qualified President.

56. The statement by the CO in paragraph 76 that :

“...Unfettered by section 47(3) of the 1992 Act, I would find it unreasonable for the pool of potential nominees for the position of President of this Union to be restricted to nine or ten persons.”

shows that the CO had in mind the risk of restricting the eligibility of election as National President to member of the NEC.

57. In my judgment the CO did not err in law in holding that:

“...rule 14.C does establish a class of members, all of whom are excluded from nomination by the rules of the Union; namely those not on the NEC. The identity of those in the class is objectively ascertainable at the time nominations are invited.”

and that

“ ...this is not a rule which provides for such a class to be determined by reference to whom the Union chooses to exclude.”

The conclusion:

“Accordingly, I find that the Union may rely upon section 47(3) to uphold its condition that candidates for the position of National President must be members of the NEC. By section 47(3) that condition is deemed not to be unreasonable.”

was open to him. The CO did not misdirect himself in law or come to a perverse conclusion in deciding that the condition in Rule 14.C that nominations for the position of President of the NUM be restricted to members of the NEC was not contrary to law.

Enforcement Order

58. Having declared that the NUM breached Section 47(1) of **TULRCA** on or around 19 December 2011 by unreasonably excluding members, in particular Mr Mace, from standing as a candidate for the NUM National President in 2012, the CO ordered that the result of the election be set aside and Mr Wilson forthwith cease to hold office. He ordered that an election for National President take place and that the result be declared no later than 18 November 2013.

59. Mr Mace could not be a candidate in the election to take place in accordance with the enforcement order made on 18 July 2013 as he has been suspended from membership of the NUM for three years from 22 March 2012. An election for National President took place in 2013 and Mr Wilson was elected. Mr Scargill contended that therefore the enforcement order did not remedy the wrong found to have been established.

60. Written submissions on the consequences of this argument were invited. Mr Scargill proposed the following directions which included:

“2. That at the close of nominations on 19 December 2011 Mr. S J Mace as the only valid nominee was elected unopposed as National Lay President to hold office for a period of five years.

3. That Mr. Mace was suspended from membership of the Union on 22 March 2012 for a period of three years and consequently in accordance with Rule 15.B of the Union's Rules Mr. Mace ceased to forthwith hold the office of National Lay President."

Further, Mr Scargill submitted that as Mr Wilson was made redundant by NUM (Scottish Area) in 2012, he ceased to qualify for full membership and should forthwith cease to hold office and a fresh election for the office of National Lay President should take place.

61. Mr Brown QC replied that the Enforcement Order made by the CO has been complied with. There had been a further election in compliance with the Order. There can be no question of Mr Wilson ceasing to hold office "forthwith".

62. The fact that Mr Mace was suspended from membership of the Union and could not be a candidate in the election which took place in compliance with the Enforcement Order is not a ground for setting aside the election which had taken place. His suspension was not caused by the application of the 30% rule which was the reason why the CO set aside the result of the election of the NUM National President in 2012.

63. The substituted Enforcement Order sought by Mr Mace depends upon Mr Wilson not being eligible in December 2011 for nomination for election for the position of National President. I have held that Mr Wilson was validly nominated for election. Even if the 30% rule in 14.C were disapplied, it is not known whether Mr Mace or indeed any other potential candidate in addition to Mr Wilson would have been nominated for election as National President in 2012.

64. Any complaint regarding election as President other than that of 2012 was not the subject of a complaint to the CO or the appeal from his decision to the EAT.

65. The appeal relating to the terms of the Enforcement Order is dismissed.

Disposal

66. The two Grounds of Appeal against the decision of the Certification Officer on the Complaints and the appeal relating to the terms of the Enforcement Order are dismissed.